STATE OF MICHIGAN
In the Supreme Court

Appeal from the Court of Appeals
Cooper, J.

PAUL DRESSEL and
THERESA DRESSEL,
Plaintiffs - Appellees

v

AMERIBANK
Defendant - Appellant

Supreme Court Docket No. 119959
Court of Appeals Case No. 222447
Kent County Circuit Court Case No. 98-013017-CP

Brief on Appeal - - *Amicus Curiae*, Michigan Association of Community Bankers

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I. BASIS OF JURISDICTION

The Supreme Court's jurisdiction in this case is based on Michigan Court Rule 7.301(A)(2) which provides that the Supreme Court may review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals.

On August 24, 2001, Defendant-Appellant AmeriBank filed an application for leave to appeal the Michigan Court of Appeals decision in the case *Dressel v AmeriBank*, Court of Appeals Case No. 222447, issued August 3, 2001, pursuant to Michigan Court Rule 7.302.

The Michigan Supreme Court granted Defendant-Appellant AmeriBank's application for leave to appeal on order of the Court entered April 23, 2002.

II. QUESTIONS INVOLVED

The Michigan Association of Community Bankers adopts the "Questions Presented for Review" as stated in the Brief on Appeal submitted by Defendant – Appellant AmeriBank. For purposes of the *amicus curiae* brief, only questions 1 through 3 will be addressed. Those questions will, however, not be addressed by the *amicus* in the order presented by Defendant-Appellant AmeriBank, but will follow the order of appearance contained herein on pages 4 and 5.

III. INTERESTS OF *AMICUS CURIAE*

Michigan Association of Community Bankers ("MACB") is a banking organization with over 300 members and associates in Michigan. Community banks believe in the importance of independent banking. The MACB was formed in 1974 to advance and safeguard the American system of community banking based on its belief that community banking is best suited to

provide financial services to the diverse individuals in the communities in which its members are located.

Community banks focus on the financial needs of local families, businesses, and farmers. They are locally owned and operated and have assets ranging from less than $10 million to a few billion dollars.[1] Officers of community banks are often very much involved in local community affairs and are easily accessible to their customers. The majority of community bank loans go to benefit the local communities where their customers live and work. When making loan decisions, community banks, unlike large commercial banks, take into account character, family history, and discretionary spending. Because these banks are small and have significant ties to the community, they are able to make lending decisions promptly and respond rapidly to the needs of the community members.

Many individuals, small businesses, and farmers look to community banks to provide them with lending products and services because of the personalized service and lower interest rates community banks offer.[2] Because community banks focus almost exclusively on financial services to individuals, small businesses, and farmers, any negative impact the Michigan Court of Appeals decision in *Dressel v AmeriBank* on these banking institutions will necessarily have a negative impact on local Michigan economies.

It is on the basis of these principles that the Michigan Association of Community Bankers files this brief as *amicus curiae* in support of the Defendant-Appellant AmeriBank's request for this Court to enter a judgment reversing the decision and order of the Court of Appeals dated August 3, 2001 and reinstating the judgment of the Circuit Court for the County of Kent dated July 12, 1999, dismissing the action.

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[1] Source: Independent Community Bankers of American ("ICBA"), 2000. Information available from the ICBA web site at www.icba.org. See "About ICBA, Community Banking Facts."
[2] Id.

IV. STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

The Michigan Association of Community Bankers adopts the Statement of Facts and Material Proceedings contained in the Brief on Appeal submitted by Defendant-Appellant AmeriBank.

V. STANDARD OF REVIEW

Defendant-Appellant AmeriBank appeals the Court of Appeals decision and order vacating the trial court's grant of AmeriBank's motion for summary disposition pursuant to Michigan Court Rule 2.116(C)(10). Because the appeal of Defendant-Appellant AmeriBank to the Supreme Court involves a decision on a motion for summary disposition, decision of the trial court is reviewed de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461, 628 NW2d 515 (2001).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. A trial court may only grant summary disposition under MCR 2.116(C)(10) if, after reviewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Smith v Global Life Ins Co,* 460 Mich 446, 453, 597 NW2d 28 (1999).

VI. ARGUMENTS

In this action, the Plaintiffs-Appellees allege that the Defendant-Appellant AmeriBank has engaged in the unauthorized practice of law. This, they assert, was accomplished, not by preparing loan documents, but rather by charging a separate fee for preparing those documents. The substance of the transaction is not in dispute. Plaintiffs-Appellees do not allege that the documents were prepared incorrectly or that the documents suffer from any legal infirmity.

Instead, the Plaintiffs-Appellees complain that the form of the transaction offends the unauthorized practice of law statutes and common law. They don't object to AmeriBank's preparing the documents; they object to having to pay for the preparation of the documents. At trial, defendant was granted summary disposition. The plaintiffs filed an appeal and the Michigan Court of Appeals reversed the grant of summary disposition. The Court of Appeals declared that by charging a separate fee for preparing mortgage loan documents, AmeriBank was engaging in the unauthorized practice of law.

In its opinion, the Court of Appeals begins with a presentation of the Michigan unauthorized practice statutes it perceives to be relevant to the actions of AmeriBank. It next presents a statement of the policy goal for enforcing these unauthorized practice of law statutes. The Court's opinion does not provide any insight into how its decision in this case furthers the announced policy goal.

The Court of Appeals continues in its opinion in *Dressel* to look at Michigan case law dealing with brokers and other types of agents performing services for others and applies that law to the facts in the underlying transaction. In doing so, the Court mischaracterizes the roles of the parties in the case at bar. That mischaracterization leads the Court to erroneously conclude that the defendant is not doing something ancillary to its business of making loans, but is instead providing a separate service for someone other than itself. Because the Court believes the defendant is providing the service for someone other than itself, it inevitably, and the *amicus curiae* believe erroneously, concludes the defendant is not entitled to the protection of the *pro se* exception of MCL 450.681.

The *amicus curiae* will address the following particular issues in this brief:

A. The policy goal of the unauthorized practice statutes as stated by the Court of Appeals is inconsistent with its judgment in the instant case.

B. The Court of Appeals erred in relying on case law addressing transactions by brokers wherein a third party prepared legal documents for other persons who were actually parties to and executed the legal documents so prepared when the underlying facts in the matter *sub judice* involve preparation of legal documents by one who is a party in interest to the legal documents so prepared.

C. The Court of Appeals erred in relying on the Michigan statutes MCL 450.681 (Practice of Law by corporations or voluntary associations prohibited; exceptions; penalty) and MCL 600.916 (Unauthorized practice of law) to conclude AmeriBank engaged in the unauthorized practice of law.

D. Even if reliance on MCL 450.681 is appropriate, the Court of Appeals decision that the statutory *pro se* exception contained in MCL 450.681 was unavailable to AmeriBank is not supported by the facts and deprives Defendant-Appellant AmeriBank of the protection to which it is entitled.

A. The policy goal of the unauthorized practice statutes as presented by the Court of Appeals is inconsistent with its judgment in the instant case.

The *amicus curiae* argue that there is obvious inconsistency between the stated policy goal of the Michigan unauthorized practice statutes[3] and the result reached by the Court of Appeals in this case. Stated more simply the issue is, how does charging a separate fee transform otherwise permissible activities into the unauthorized practice of law?

Court opinions from most jurisdictions declare that the singular purpose of unauthorized practice statutes is to protect the public from injury that may result from a layperson giving legal advice.[4] In its opinion in *Dressel*, the Court of Appeals itself asserts that "[t]he courts must weigh all the factors, keeping in mind the purpose of the prohibition, which is to protect the public from untrained legal counsel and incorrect legal advice," *Dressel v AmeriBank*, 247 Mich

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[3] MCL 450.681 Practice of law by corporations or voluntary associations prohibited; exceptions; penalty, and MCL 600.916 Unauthorized practice of law.

[4] *In re First Escrow, Inc.*, 840 S.W.2d 839 (Mo. S.Ct. 1992)("The duty of this Court is not to protect the Bar from competition but to protect the public from being advised or represented in legal matters by incompetent on unreliable persons") at 840; *In re Opinion No 26 of the Committee on the Unauthorized Practice of Law* 139 NJ 323, 654 A2d 1344 (NJ SCt 1995)("The question of what constitutes the unauthorized practice of law . . . involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law") at 1345-1346; *Perkins v CTX Mortgage Co*, 137 Wash2d 93, 969 P2d 93 (1999)("Our underlying goal in unauthorized practice of law cases has always been the promotion of the public interest. Consequently, we have prohibited only those activities that involved the lay exercise of legal discretion because of the potential for public harm") at 98; *Cain v Merchants Nat'l Bank & Trust Co of Fargo*, 66 ND 746, 268 NW 719 (ND SCt 1936)("It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests with all attorneys") at. 722; *Cardinal v Merrill Lynch Realty/Burnet, Inc*, 433 NW2d 864 (Minn SCt 1989)("we have quoted extensively from these earlier decisions to illustrate this court's abiding concern for the public interest in determining whether certain conduct constitutes the unauthorized practice of law and also the difficulty in defining with any precision that conduct that is unauthorized. The overriding consideration in the case before us, in keeping with our tradition in these matters, is the public welfare rather than the advantage that might accrue to lawyer or nonlawyer") at 868; *People v Alfani*, 227 NY 334, 125 NE 671 (Ct App NY 1919)("The reason why preparatory study, educational qualifications, experience, examination, and license by the courts are required, is not to protect the bar, as stated in the opinion below, but to protect the public.") at 673.

App 133, 137-38 (2001)(emphasis supplied), p. 1-2, citing *State Bar of Michigan v Cramer*, 399 Mich 116, 132 (1976).[5]

However, after declaring that to be the policy behind Michigan's unauthorized practice statutes, the Court of Appeals proceeds to provide an analysis that leads to the inevitable conclusion that the goal of these statutes is not to protect citizenry from the dangers of a layperson giving legal advice, or even paying for that advice, but rather to protect citizenry from paying a "separate" fee for that advice, good or bad.

The Court of Appeals in its *Dressel* opinion cites with approval the decision of the Supreme Court of North Dakota in *Cain v Merchants Nat'l Bank & Trust Co. of Fargo*, 66 ND 746, 268 NW 719 (1936), indicating that case holds a defendant can continue to prepare documents incidental to its business provided that no separate fee is charged. The opinion goes on to state "[t]his Court agrees with the majority opinion of states that charging a fee can take an otherwise incidental act into the realm of the unauthorized practice of law. We agree that drafting mortgage documents was incidental to defendant's business, however *the key issue is the fact that a fee was charged for those services*." *Dressel*, at 3. (emphasis added). The emphasized language quoted above clearly demonstrates the Court of Appeals focus on the *paying* for services, rather than *what* services are being provided as the key to its decision.

The Minnesota Supreme Court's holding in *Cardinal v Merrill Lynch Realty/Burnet, Inc*, 433 NW2d 864, 869 (Minn 1988) is opposite to that reached by the *Dressel* court. In *Cardinal v Merrill Lynch Realty/Burnet, Inc*, the Minnesota Supreme Court was called on to decide if a real

[5] This Court has likewise recognized the protection of the public from bad advice as the policy goal to be addressed by the unauthorized practice of law statutes. E.g. *State Bar of Michigan v Cramer*, 399 Mich 116 (1975)("It is the purpose of public protection which must dictate the construction we put on the term 'unauthorized practice of law.'") at 134; *Petitions of Ingham County Bar Ass'n v Walter Neller Co.*, 342 Mich 214 (1955)("'The public should be protected from falling into the hands of one not skilled in the laws of conveyancing when seeking advice or service having to do with real-estate titles.'") at 223.

estate company was engaged in the unauthorized practice of law when it charged a fee for preparing documents incident to real estate closings. The Court correctly, the *amicus* argue, pointed out that:

> [c]ommon sense suggests, however that charging a fee for services which include the preparation of ordinary documentation for a real estate transaction does not convert a practice otherwise lawful into the unauthorized practice of law. MLRB could well have chosen to increase its rate of commission to reflect what would amount to the additional drafting fee and thereby hide the cost. That it instead opted for disclosure and enumerated the routine services encompassed by the fee is not determinative. . . .
>
> To assert that whether conduct amounts to the unauthorized practice of law turns on what the actor calls the fee -- on the mere designation of the charge as a 'drafting fee'-- is to exalt form over substance and to ignore the public welfare concerns.

Merrill Lynch, at 869.

The *amicus curiae* urge the Michigan Supreme Court to adopt this "common sense" approach.

There are several inconsistencies raised by the Court of Appeals holding in *Dressel* when viewed against the policy of protecting the public from untrained legal counsel and incorrect legal advice. First, if protecting the public from bad legal advice is the goal, then allowing laypeople to engage in activities that are generally acknowledged to be within the realm of the practice of law (preparing loan closing and mortgage documents), as long as they don't charge a separate fee for doing so, is an ineffective means of achieving that end.

Moreover, the holding of the Court of Appeals does not support the stated policy goal of protecting the unsuspecting citizenry from the ills of bad legal advice. In its opinion in *Dressel* the Court of Appeals stated:

> [t]his Court agrees with the majority opinion of the states that charging a fee can take an otherwise incidental act into the realm of the unauthorized practice of law. We agree that drafting mortgage documents was incidental to defendant's [AmeriBank's] business; however, the key issue is the fact that a fee was charged for those services.

Dressel at p. 3.

The *amicus* believe that the above statement illustrates the Court of Appeals is primarily concerned with protecting people from *paying* for services, not from *getting* those services by one not a licensed member of the State Bar.

The second inconsistency is the Court of Appeals holding that charging a "separate" fee is the key to these activities being within the realm of the unauthorized practice of law. If a charge is made, but it is not a separate charge, is that still the unauthorized practice of law? Surely, that cannot be the case. Numerous industries, in addition to financial institutions, engage in similar practices on a daily basis and courts have never been wont to declare them to be engaged in the unauthorized practice of law.

For example, insurance companies negotiate and execute settlement agreements incidental to their business and those agreements most assuredly affect the legal rights and obligations of those who are parties to such agreements. It is unlikely that insurance companies do not recover, at a minimum, the cost for these activities by way of the premiums charged to their customers.

Likewise, retail merchants negotiate and execute sale/purchase agreements with customers on a daily basis. It is equally unlikely that such merchants do not cover their cost, plus some profit margin through their product pricing and purchase financing. Can all of these commercial entities be engaging in the unauthorized practice of law unabated?

The inconsistencies presented by the Court of Appeals' statement of the policy goal of unauthorized practice statutes and its holding in this case should not be lost on the Supreme Court. The MACB urges the Supreme Court to grant Defendant-Appellant AmeriBank's request to vacate the judgment of the Court of Appeals and reinstate the judgment of the Kent County

Circuit Court. To do otherwise is to perpetuate inconsistencies so apparent that they can do little to support the public's confidence in the judicial system.

B. The Court of Appeals erred in relying on case law addressing transactions by brokers wherein a third party prepared legal documents for other persons who were actually parties to and executed the legal documents so prepared when the underlying facts in the matter *sub judice* involve preparation of legal documents by one who is a party in interest to the legal documents so prepared.

The factual and functional differences between lenders and brokers makes the application of the cases relied on by the Plaintiffs/Appellees and the Court of Appeals inappropriate in resolving the question of whether Defendant/Appellant AmeriBank engaged in the "unauthorized practice of law."

The Court of Appeals relies heavily on three Michigan cases, as well as various cases from other jurisdictions, to reach its conclusion that AmeriBank engaged in the unauthorized practice of law by charging a separate fee for preparing mortgage loan documents. The Court's reliance on these cases is misplaced because there are critical factual distinctions between the cases relied on and the situation presented in the case at bar.

The Michigan cases relied on by Court deal with real estate brokers. E.g., *Grand Rapids Bar Ass'n et al v Denkema*, 290 Mich 56, 287 NW 377 (1939)(defendant was "engaged in the business of general insurance and real estate loans" and "drawing leases, land contracts, deeds and mortgages *for other people*") at 59 (emphasis added); *Ingham County Bar Ass'n v Walter Neller Company, et al*, 342 Mich 214, 69 NW2d 713, 53 ALR2d 777 (1955)(defendant corporation was a realty company in Lansing, Michigan and the individual defendants were

licensed in Michigan as real estate brokers); *State Bar of Michigan v Kupris*, 366 Mich 688, 116 NW2d 341(1962)(defendant was licensed by the state as a real estate broker).

There are critical factual distinctions between the functions of brokers and bankers. By failing to account for those distinctions, the Court of Appeals mischaracterizes the roles of the parties in this case and erroneously concludes that someone who is an actual party to a transaction engages in the unauthorized practice of law by charging a separate fee for the preparation of documents it will use itself in conducting its business.

Michigan law recognizes that there is a difference between persons who act as brokers, whether real estate or mortgage, and persons who act as lenders. This difference is clearly demonstrated in Chapter 445, Trade and Commerce, Mortgage Brokers, Lenders, and Servicers Licensing Act of Michigan Complied Laws Annotated, which defines mortgage brokers as:

> (i) . . . a person who, directly or indirectly, does 1 or both of the following:
>
> (i) serves or offers to *serve as an agent* for a person in an attempt to obtain a mortgage loan.
>
> (ii) serves or offers to *serve as an agent* for a person who makes or offers to make mortgage loans.
>
> (j) "Mortgage lender" means a person who, directly or indirectly, makes or offers to make mortgage loans.
>
> * * *
>
> (n) "Real estate broker" means a broker or associate broker licensed under article 25 of the occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.2501 to 339.2518 of the Michigan Complied Laws.

MCL 445.1651a. (emphasis added).

A real estate broker is defined as:

> [A]n individual, sole proprietorship, partnership, association , corporation, common law trust, or a combination of these entities who with intent to collect or receive a fee, compensation, or valuable consideration, sells or

> offers for sale, buys or offers to buy, provides or offers to provide market analyses, lists or offers or attempts to list or negotiates the purchase or sale or exchange or mortgage of real estate, or negotiates for the construction of a building on real estate; who leases or offers or rents or offers for rent real estate or the improvements on the real estate *for others*, as a whole or partial vocation; who engages in property management as a whole or partial vocation; who sells or offers for sale buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business *for others*; or who, as owner or otherwise, engages in the sale of real estate as a principal vocation.

MCL 339.2501(d) (emphasis added).

Black's Law Dictionary also provides useful guidance in illustrating the distinction between the role brokers play and the role lenders play. According to Black's, a broker is:

> *An agent who acts as an intermediary or negotiator*, esp. between prospective buyers and sellers; a person employed to make bargains and contract between *other persons* in matters of trade, commerce, and navigation. (emphasis supplied)
>
> *Mortgage broker.* An individual or organization that markets mortgage loans and brings lenders and borrowers together. [In this context the word "markets" has the meaning of "act or process of promoting."] A mortgage broker does not originate or service mortgage loans.

7th Edition (1999), Bryan A. Garner, Editor in Chief.

The decision below is in error because the controlling case law relied on by the Court of Appeals deals with defendants who are licensed real estate brokers, or were conducting themselves as if they were licensed brokers. As noted above, the defendants in these cases were not otherwise parties to the underlying transactions for whose benefit the documents were prepared. The result is the effect of applying the law of brokers to the case of bankers.

The Court of Appeals opinion in *Dressel* itself provides all of the support necessary on this issue. For example, the opinion states:

> [s]everal Michigan cases have endeavored to provide relevant criteria to determine what activities amount to the practice of law. For example, the

> Court, in *Grand Rapids Bar Ass'n* (citation omitted), concluded that charging a fee for the preparation of legal instruments *for others* constitutes the practice of law.

Dressel at 2 (emphasis supplied).

The Court of Appeals opinion continues by noting:

> [o]ur Supreme Court examined numerous cases from other jurisdictions and noted that:
>
> '[t]he preparation of conveyances of real estate and personal property by the defendant *for others*, for a consideration, comes within the usual and ordinary definition of "practice of law."'

Id. (citations omitted)(emphasis supplied).

In its discussion of the *Denkema* case, the Court of Appeals opinion states:

> [u]ltimately, the Court concluded that '[t]he activities of the defendant in connection with the probate of estates *in which he was not personally interested* come within the prohibition of the Michigan statute.' *Denkema, supra* at 69.

Id. (emphasis supplied).

Likewise, in its discussion of the Supreme Court case of *State Bar of Michigan v Kupris*, supra, the *Dressel* Court describes the activities of the defendant that subjected him to suit for engaging in the unauthorized practice of law: "[i]n *Kupris*, the defendant realtor charged a separate fee for the preparation of legal documents *in a transaction in which he was not involved.*" *Dressel* at 2. (emphasis supplied).

Banks are in the business of making a profit from lending money to borrowers. To induce banks to lend money, borrowers give lenders rights in property pledged as collateral. Borrowers may also grant the bank recourse to recover amounts due from the borrower independent of any collateral pledged. To secure its legal rights to recourse and in the collateral, banks prepare promissory notes, mortgages, deeds, and other related documents. Without the

obligations imposed on borrowers and legal rights granted to banks in these documents, banks would not extend credit to borrowers.

AmeriBank is a for-profit community bank that lends money to borrowers for, among other things, home mortgages. In the present case, AmeriBank prepared the documents for which the fee was charged as part of its business of loaning money. AmeriBank would not loan money or make home mortgages without securing its legal rights in the note and mortgage.

Because it is in the for-profit business of making loans, AmeriBank charges its customers for the preparation of the documents required to secure the legal rights necessary to induce the bank to make the loan. AmeriBank prepared the mortgage loan documents at issue in this case to secure its legal rights in the collateral pledged by the Dressels, namely their home. Unlike the defendants in the cases relied upon by the Court of Appeals, AmeriBank does not prepare mortgage loan documents for transactions in which it is not the lender. AmeriBank did not, and does not, prepare the mortgage loan documents *for others*. AmeriBank prepares mortgage loan documents for use in transactions to which it is a party.

The *amicus curiae* call the Supreme Court's attention to other critical distinctions between brokers and bankers in home sales and mortgage transactions; distinctions that make the application of case law dealing with brokers inappropriate to factual cases dealing with banks. When a bank lends money, particularly in consumer home mortgage transactions, both state and federal law place a very high burden on the bank to comply with myriad regulations. Moreover, there are numerous and severe penalties if banks' fail to comply with those regulations.

However, unlike banks, real estate brokers are not subject to regulatory compliance requirements related to the underlying note and mortgage, such as Equal Credit Opportunity and Truth in Lending, 15 U.S.C.A. § 1601 et seq.; Home Mortgage Disclosure Act of 1975 (HMDA),

12 U.S.C.A. § 2801 et seq.; Real Estate Settlement Procedures Act (RESPA), 12 U.S.C.A. § 2601 et seq. If some issue of noncompliance arises after the loan closes, the impact on banks and brokers is dramatically different. The broker's "interest" in the transaction does not change. The broker has undoubtedly received his or her commission or fees and has gone on to put together another deal. The bank, however, is liable for any regulatory noncompliance and can face severe penalties as a result.[6]

Likewise, if after a loan closes the mortgagors default on the loan, there is absolutely no impact on a broker because he or she was not a party to either the note or mortgage. He or she has received his or her commission or fees and moved on. The bank, however, is still very much a party to the transaction and has secured for itself by the very documents at issue here, specific legal rights to address any default, up to and including foreclosing on the property.

The Court of Appeals in its *Dressel* opinions relies in large part on the Michigan Supreme Court decision in *Grand Rapids Bar Ass'n v Denkema*, 290 Mich 56; 287 NW 377 (1939). In *Denkema*, the Supreme Court noted:

> [t]he preparation of conveyances of real estate and personal property by the defendant *for others, for a consideration*, comes within the usual and ordinary definition of "practice of law." The preparation of legal papers in connection with his business as a loan broker has been held to be the practice of law. [Id. at 66 (citing *Ferris v Snively*, 172 Wash. 167, 19 P.2d 942, 90 A.L.R. 278 (1933); *State ex rel Wright v Barlow*, 131 Neb. 294, 268 NW 95 (1936).]

Id at 64.

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[6] Penalties for violation of the referenced statutes can include civil penalties, criminal penalties, monetary penalties and exclusion from participating in programs such as Fannie Mae, Freddie Mac, and HUD. See 24 C.F.R. § 3500, 19, 24 C.F.R. § 24.200, 12 C.F.R. § 203.6, 15 U.S.C.A. 15 § 1691e. Financial institutions can also lose their insured status with the Federal Deposit Insurance Corporation, and the loss of insured status results in loss of privilege to participate in the Federal Reserve System. See 12 U.S.C.A. § 1818(o). The loss of the privilege to participate in the Federal Reserve System is almost always fatal and effectively closes a financial institution because depositors are extremely reluctant to place their money in financial institutions whose deposits are uninsured.

The *Denkema* Court also agreed with the proposition that the preparation of legal documents, *when done as a business*, constitutes the practice of law. *Denkema*, supra at 66-67 (citations omitted). The Supreme Court concluded in *Denkema* by stating that "[t]he activities of the defendant in connection with the *probate of estates in which he was not personally interested* come within the prohibition of the Michigan statute." *Denkema,* supra at 69, cited in *Dressel* at 2 (emphasis supplied).

The Appeals Court in *Dressel* concludes its summary of the holding in *Denkema* by stating that the Supreme Court's decision in that case "provides that the preparation of legal documents constitutes the practice of law when it is done as a business, by an uninterested party, and when advice or counsel is given concerning the effect of those documents." *Dressel* at 3.

As a strictly factual matter, there is no similarity between the present case and the *Denkema* case. Moreover, even if one could analogize the activities of the defendant in *Denkema* to those of Defendant-Appellant AmeriBank, the criteria set out above do not lead to the conclusion that AmeriBank engaged in the practice of law, but, in fact, lead to the conclusion that AmeriBank did not engage in the practice of law, "authorized" or "unauthorized."

AmeriBank is not in the business of manufacturing legal documents. AmeriBank is in the business of banking, part of which is making loans. The legal documents prepared were done so as an integral part of AmeriBank's business of making loans. The documents in question secure AmeriBank's legal rights in the collateral pledged by the Dressels. Moreover, AmeriBank is not an uninterested party. As a secured party to the loan transaction, AmeriBank has significant interests in the transaction. The bank is not acting as merely a preparer of documents for use by unrelated parties; for use by any person other than itself. Finally, there is

no evidence or allegation that AmeriBank engaged in giving any advice or counsel as to the effect of those documents or that the documents themselves are somehow defective.

In support of its holding the Court of Appeals points to the Indiana case of *Miller v Vance*, 463 NE2d 250 (Ind. 1984), which is factually the same as the case at bar. At the end of its opinion, the *Vance* court stated "[t]he bank may not make any separate charge for the preparation of the mortgage instrument. *See State v Indiana Real Estate Association, Inc.*, 244 Ind at 224-225, 191 NE2d at 716-717", *Vance* at 253.

The Indiana Supreme Court provided no explanation of why it did not take into account the fact that the case upon which it relied, *Indiana Real Estate Ass'n*, was a case dealing with real estate brokers. The court in *Indiana Real Estate Ass'n* quoted with approval the outline of limits placed on brokers and agents articulated in the Missouri case of *Hulse v Criger*, stating:

> A *real estate broker* may not make a separate charge for completing any standardized forms, and he may not pretare (sic) such forms for persons in transactions, in which he is not acting as a broker, unless he is himself one of the parties to the contract or instrument. *Hulse v Criger,* 363 Mo. 26, 45-46, 247 S.W.2d 855, 862 (1952).

Id, at page 717. (emphasis added).

As we have demonstrated, there are genuine factual distinctions between the role of brokers and of banks. These factual distinctions apparently were overlooked by the Indiana Supreme Court in its analysis, inevitably leading it down the path of applying the law of brokers to the case of banks. The proper characterization and distinction between bankers and brokers is not insubstantial. It is the difference between acting in a transaction for one's self and acting on behalf of others. Banks are not brokers; the two play important yet completely distinct roles in real estate transactions.

The Court of Appeals' apparent failure in its opinion in *Dressel* to appreciate the separate and distinct roles of banks and brokers in real estate transactions leads the Court to misapply case law. Brokers have a secondary financial interest in transactions they facilitate. The Court of Appeals seems to presume that such a secondary financial interest of a broker is sufficiently similar to the primary interest of a bank so as to make the application of case law dealing with brokers and the unauthorized practice of law appropriate in the case at bar. This presumption is in error for the reasons stated.

It would be unfortunate for the jurisprudence of this State if our Supreme Court were to adopt and perpetuate a position based on what appears to be less than thorough analysis. Therefore, the MACB respectfully requests this Court grant Defendant-Appellant AmeriBank's request to reverse the decision and order of the Court of Appeals and reinstate the judgment of the Kent County Circuit Court.

C. The Court of Appeals erred in relying on the Michigan statutes MCL 450.681 (Practice of Law by corporations or voluntary associations prohibited; exceptions; penalty) and MCL 600.916 (Unauthorized practice of law) to conclude AmeriBank engaged in the unauthorized practice of law.

The appeals court's reliance on MCL 450.681 and MCL 600.916 as the basis for its decision in this case is misplaced. The statute relative to the practice of law by corporations, MCL 450.681 is penal in nature. It specifically provides that the penalty for violation of the statute is criminal. Moreover, MCL 450.681 does not provide a private cause of action for violations of the statute. Likewise, MCL 600.916 cannot properly form the basis of the Court of Appeals' decision because that statute deals only with individuals who engage in the unauthorized practice of law, not corporate entities.

At the beginning of its opinion, the Court of Appeals states:

> Michigan law prohibits the unauthorized practice of law by individuals. MCL 600.916. Moreover, MCL 450.681 specifically enjoins corporations from practicing law without a license. That statute in pertinent part, provides that:
>
> > [i]t shall be unlawful for any corporation or voluntary association to practice or appear as an attorney-at-law for any person other than itself in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for any person other than itself . . . .
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> > This section shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation or voluntary association lawfully engaged in the examination of insuring of titles of real property, or shall it prohibit a corporation or voluntary association from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party . . . . But no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in this state nor to solicit directly or indirectly professional employment for a lawyer.[7]

Dressel at page 2.

Interestingly, a portion of the omitted statutory language describes the penalty for violation of the statute.

> Any corporation or voluntary association violating the provisions of this section, and every officer, trustee, director, agent or employe (sic) of such corporation or voluntary association who directly or indirectly engages in any of the acts herein prohibited or assists such corporation or voluntary association to do such prohibited acts shall be guilty of a misdemeanor, and shall be punished by a fine of not to exceed 1,000 dollars or by imprisonment for a period of not to exceed 6 months, or by both such fine and imprisonment, in the discretion of the court.[8]

Nowhere in MCL 450.681 does the statute provide for a private cause of action against a corporation or voluntary association for violation its provisions. Because of the penal nature of the penalty for violation of the statute and the failure of the statute to provide a private cause of

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[7] MCL 450.681.
[8] Id.

action, it was inappropriate for the Court of Appeals to use MCL 450.681 as a basis for its decision the AmeriBank engaged in the unauthorized practice of law.

This point is well borne out by the cases that comprise the annotations to MCL 450.681.[9] There are two cases in the annotations to MCL 450.681 that do not show some organization of the State Bar or the Bar itself as plaintiffs. The cases are *Blachy v. Butcher*, 35 F.Supp2d 554 (WD MI 1998) and *Dressel v. AmeriBank.*

In *Blachy v Butcher*, the United States District Court for the Western District of Michigan summarily disposed of the plaintiffs' claims that defendants were violating MCL 450.681 as follows in its discussion on the issue of standing and jurisdiction:

> Before addressing Plaintiffs' request for imposition of a constructive trust, the Court will address Defendants' arguments that Plaintiffs lack standing and that this Court does not have jurisdiction over Plaintiffs' constructive trust claim. Defendants first contend that Plaintiffs lack standing to maintain a claim for imposition of a constructive trust. Defendants' standing argument is actually a conglomeration of many different arguments, each of which lacks merit.[FN2]
>
> [FN2] One such argument, which does not merit any significant substantive review, is that Lawyers Title is barred from seeking relief to resolve the purchasers' title problems by MCL § 450.681, which prohibits the unauthorized practice of law by corporations, and MCL § 500.7304, which prohibits the unauthorized practice of law by title insurance companies. Neither section applies because Lawyers Title is represented in this case by attorneys, who also happen to represent the purchasers. The purchasers were named as plaintiffs pursuant to the title insurance policies, which permit Lawyers Title to take any legal action necessary to obtain clear title for the purchasers. Thus, Lawyers Title is simply attempting to fulfill its obligations under the title policy by providing the purchasers clear title to the condominium units they purchased.

Blachy v. Butcher, at p. 557.

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[9] *Detroit Bar Ass'n v Union Guardian Trust Co,* 282 Mich 216, 276 NW 365 (1937), rehearing denied 282 Mich 707; *Bay County Bar Ass'n v Finance Systems, Inc*, 345 Mich 434 (1956); *Petitions of Ingham County Bar Ass'n,* 342 Mich 214, 69 NW 2d 713 (1599); *State Bar of Michigan v. Galloway*, 124 MichApp. 271, 335 NW 2d 475 (1983), affirmed 442 Mich 188.

That leaves *Dressel v. AmeriBank* as the only other suit brought by private citizens against a corporation alleging that a corporation engaged in the unauthorized practice of law which would be in violation of MCL 450.681. This anomaly is not surprising since Michigan Court Rules of 2002,[10] Rules Concerning the State Bar of Michigan, Rule 16 Unauthorized Practice of the Law, specifically authorizes the State Bar to file and prosecute actions relating to unauthorized practice:

> The State Bar of Michigan is hereby authorized and empowered to investigate matters pertaining to the unauthorized practice of law and, with the authority of its Board of Commissioners, to file and prosecute actions and proceedings with regard to such matters.

The other statute cited by the Court of Appeals in its opinion (MCL 600.916) prohibits the unauthorized practice of law by individuals. *Dressel* at page 2. As such, that statute cannot form an appropriate basis for a decision that Defendant-Appellant AmeriBank, as a corporate entity, has engaged in the unauthorized practice of law. Since Plaintiffs-Appellees do not claim that the actions of a particular individual comprise what it alleges to be the unauthorized practice of law, MCLA 600.916 cannot properly form the basis for the Court of Appeals holding below.

D. Even if reliance on MCL 450.681 is appropriate, the Court of Appeals erred by failing to apply the statutory *pro se* exception contained in MCL 450.681 which deprives Defendant-Appellant AmeriBank of the protection to which it is entitled.

Assuming that the suit by Plaintiffs-Appellees provides an appropriate venue for the Court of Appeals to apply MCL 450.681, it appears that the Court did not do so. As a corporation acting for itself, AmeriBank is entitled to the protection of the *pro* se exception provided for in MCL 450.681, which states:

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[10] Michigan Rules of Court – State – 2002, Copyright 2002 by West Group, p. 789.

> It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney-at-law *for any person other than itself* in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for *any person other than itself*, in any of said courts or to hold itself out to the public as being entitled to practice law, or render or furnish legal services or advice . . . . (emphasis supplied).

The Court of Appeals failed to provide legal analysis or support for its conclusion that AmeriBank is not entitled to the *pro se* exception of MCL 450.681. The *amicus curiae* believe that this conclusion is in error. The Court summarily dismissed AmeriBank's assertion of its right to the statutory defense of the pro se exception, stating:

> Defendant claims that it was acting on its own behalf when it prepared plaintiffs' mortgage and that the 'pro se exception,' (citations omitted) allows individuals and companies to prepare legal documents for themselves. Thus, defendant opines that its actions were not the unauthorized practice of law because it was an interested party to the transaction. However, we believe that the separate fee for the preparation of mortgage documents by a bank crosses the threshold of providing services for the bank's own benefit and engaging in a business where a profit is made from manufacturing legal documents without the requirement of licensure from the state bar. If the preparation of the mortgage documents for defendant's customers was not a service, but rather incidental to its business as defendant claims, then there would be no basis for the separate charge to defendant's customers.

Dressel at 5.

In its opinion, the Court of Appeals points to no language in the statute that would make it inapplicable to AmeriBank, and the activities at issue in this case. The inference given by the language of the Court of Appeals' opinion is that because there is another party involved in the transaction in addition to AmeriBank and that party had to pay transaction costs, AmeriBank did not prepare the documents in question for its own benefit ("[i]f the preparation of the mortgage documents for defendant's customers was not a service, but rather incidental to its business as defendant claims, then there would be no basis for the separate charge to defendant's

customers.") *Id.* The *amicus* believe that if, in fact, that is what the Court means it is in error and should be reversed.

As an initial matter, it must be observed that the very use of the word "incidental" by the Court of Appeals to describe the type of documents at issue in this case starkly demonstrates the Court's failure to appreciate the nature of the activity. Black's Law Dictionary 7th Edition defines "incidental" to mean "subordinate to something of greater importance; having a minor role," at page 765. Anyone familiar with mortgage lending can attest to the fact that without the documents for which the fee was charged, there would be no loan to the borrowers. Deeds and mortgages are the central documents of any home loan. Without that security interest, no bank would make a loan for the purpose of and in the amounts that are secured by mortgages and deeds.

By definition, the types of documents at issue in this case involve two (and can involve more than two) parties. The following are definitions given by Black's Law Dictionary, 7th Edition to terms relevant the documents in issue here:

> Mortgage 1. A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms. 2. A lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms.
>
> Stipulation 1. A material condition or requirement in an agreement; esp., a factual representation that is incorporated into a contract as a term.
>
> Agreement 1. A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. 2, The parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.

> Conveyance 1. A voluntary transfer of a right or of property. 2. The transfer of a property right that does not pass by delivery of a thing or merely by agreement. . . . 4. The document (usu. a deed) by which such a transfer occurs.
>
> Deed. 2. A written instrument by which land is conveyed. 3. At common law, any written instrument that is signed, sealed, and delivered and that conveys some interest in property.
>
> Transfer 1. Any mode of disposing of or parting with an asset or an interest in an asset, including the payment of money, release, lease or creation of a lien or other encumbrance. . . 3. A conveyance of property or title from one person to another.
>
> Lien 1. A legal right or interest that a creditor has in another's property, lasting usu. until a debt or duty that it secures is satisfied.
>
> Encumbrance A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest.

It is difficult to conceive of a banking transaction in which the bank is the only party. Moreover, these two-party transactions are much like those mentioned earlier which this Court has to date declined to call the unauthorized practice of law—insurance negotiation and claim settlement and retail sale/purchase agreements.

The statute, MCL 450.681, provides that it is unlawful for a corporation to engage in any of a number of specific activities for "any person other than itself." What the statute plainly does not say is that these activities are lawful if and only if the activity engaged in has but one party; the corporation. The fact that the bank engages in activities for itself and those activities by definition require two or more parties, one of which is always the bank, does not make it any less an activity that the bank engages in for itself. Neither the activities enumerated in MCL 450.681, nor the particular activities engaged in by AmeriBank in the case *sub judice* occur in a vacuum.

The Court of Appeals did not provide an explanation of why someone who is an actual party to a transaction may not recover the cost of doing business, or may not make a profit at that

business. It simply stated that "[i]f the preparation of the mortgage documents for defendant's customers was not a service, but rather incidental to its business as defendant claims, then there would be no basis for the separate charge to defendant's customers."

The analysis appears to be that because there was a separate charge, the preparation of the mortgage documents was not incidental to the bank's business. What is missing from this analysis, however, is why a bank (or any other for-profit commercial entity) would not or could not charge a fee for activities "incidental" to its business. Moreover, there is nothing in the statute that requires activities be merely "incidental" or more than "incidental" to qualify for protection under the *pro se* exception.

As this court recently stated:

> [o]ur judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. *White v Ann Arbor*, 406 Mich 554, 562, 281 NW2d 283 (1979). A fundamental principle of statutory construction is that 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.' *Coleman v Gurwin*, 443 Mich 59, 65, 503 NW2d 435 (1993). When the legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. (citations omitted). Finally, in construing a statute, we must give the words used by the Legislature their common, ordinary meaning. These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated intent of the Legislature with the likely consequences that a court will impermissibly substitute its own policy preferences. . . .

People v McIntire, 461 Mich 147, 152-154 (1999).

The Court of Appeals itself has recently had occasion to address the issue of statutory construction. In *Gilbert v Second Injury Fund*, 244 MichApp. 326 (2001), *application for leave to appeal denied*, (Mich Sept 21, 2001) (No 118564), the Court of Appeals was reconsidering a prior decision. The Supreme Court had remanded the case, pointing out that in its prior decision, the Court of Appeals "declined to apply MCL 418.372(2); MSA 17.237(372)(2) without noting any ambiguity in the statutory language, "and our Supreme Court reminded us that we may engage in judicial construction of a statute only if we first determine that the statutory language is ambiguous." *Gilbert* at 328.

The decision in the *Dressel* case rests on similar failing. The Court of Appeals simply declined to apply MCL 450.681 without noting any ambiguity in the language of the statute. If there is no ambiguity in the statute, the Court may not engage in judicial construction of statutory language. The language of the statute is very plain. The Legislature has determined that if a corporation engages in the enumerated activities for any person other than itself it is engaging in the unauthorized practice of law. Nowhere in MCL 450.681 does the statute say that to be entitled to the protection of the *pro se* exception a corporation may not recover its cost of doing business. Likewise the statute does not prohibit corporations who undertake these certain activities for themselves from being for-profit organizations.

The statute makes no reference to the idea that these activities are not the unauthorized practice of law as long as no charge is made to customers for a corporation's lawful business services, in the instant case for making home loans. There is no requirement in the statute that a corporation not make a profit from the business it is in. The only statutory requirement is that a corporation may not undertake the enumerated activities for any person other than itself.

By engaging in judicial statutory construction of a statute that is unambiguous, the Court of Appeals arguably exceeded its authority. Neither unauthorized practice of law statute (MCL 600.916 and MCL 450.681) attempt to define what the "practice of law" means, "[r]ather, such determinations have been left to the discretion of the courts. *State Bar of Michigan v Cramer*, (citation omitted)." *Dressel* at 1. The Court of Appeals has recognized that it is within the Legislature's authority to regulate the practice of law, "such statutory enactments are not an unconstitutional invasion of judicial power." *State Bar of Michigan v Galloway*, 124 MichApp. 271, 279 (1983)(citing *Ayers v Hadaway*, 303 Mich 589, 597 (1942), *Detroit Bar Ass'n v Union Guarding Trust Co*, 282 Mich 216, 225-228 (1937).

Moreover, "the courts have acknowledged that, in addition to their own inherent power, the Legislature has a legitimate interest in regulating the practice of law as part of its concern for the public welfare. See Const. 1963, art 4 § 51." *Galloway*, at 279. As a part of its concern for the public welfare, the Michigan Legislature has declared that a corporation may engage in certain activities for itself that would otherwise subject it to penalty for the unauthorized practice of law. The Court of Appeals points to no ambiguity in MCL 450.681 which would make it inapplicable to AmeriBank's home mortgage lending activities and, in fact, appears to have failed to apply the statute.

As the Supreme Court noted in *Tyler v Livonia Public Schools*, 459 Mich 382, 392 n. 10, 590 NW2d 560, 133 Ed. Law Rep. 1016 (1999), "our role as members of the judiciary is not to determine whether there is a 'more proper way,' that is, to engage in judicial legislation, but is rather to determine the way that was in fact chosen by the Legislature." The Legislature has chosen to not subject corporations to penalty for certain acts when the corporations engage in the

activities for themselves. While the Court of Appeals may prefer a different interpretation of MCL 450.681, the law does not allow it.

There is no contention by the Appellee and the Court of Appeals does not assert that MCL§ 450.681 is an unconstitutional legislative intrusion into a field entrusted solely to the judicial branch. "A duly enacted statute that does not offend the constitution must be applied according to its plain meaning." *Gilbert v Second Injury Fund*, at 332, citing *Tyler v Livonia Public Schools, Id.*

The Court of Appeals' apparent failure to apply the statute is clearly erroneous and deprives AmeriBank of the protection of the *pro se* exception of MCL 450.681 to which it is entitled. For this reason, the *amicus curiae* respectfully request this Court grant Defendant-Appellant AmeriBank's request to reverse the judgment of the Court of Appeals and reinstate the order to the Circuit Court of Kent County.

VII. CONCLUSION and RELIEF REQUESTED

The decision of the Michigan Court of Appeals in the case of *Dressel v AmeriBank* involves legal principles of major significance to the state's jurisprudence. The question of determining that engaging in certain activities for a separate fee transforms otherwise permissible activities into the unauthorized practice of law, and how such a determination furthers the stated policy goal behind the unauthorized practice statute is one of major significance to the state's jurisprudence.

By mischaracterizing the role of Defendant-Appellant AmeriBank in the transaction related to the preparation of the mortgage loan documents in question, the Court of Appeals is led to misapply case law. That misapplication treats brokers and bankers as if they are similarly

situated parties in mortgage loan transactions. There are specific and significant factual distinctions between the role of a broker and that of a banker that make it inappropriate to apply case law regarding brokers to a factual situation of a bank. In misapplying case law, the Court of Appeals commits clear error and that error results in material injustice.

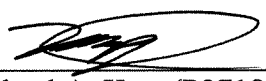
The Court of Appeals also erred by not applying the *pro se* exception of MCL 450.681 to appellant AmeriBank's activities. The Court points to no ambiguity in the statute that would allow an interpretation that would make the statute and its *pro se* exception inapplicable to AmeriBank. The apparent failure of the Court of Appeals to apply the *pro se* exception of MCL 450.681 to AmeriBank's activities deprives Appellant of the statutory protection to which it is entitled. Denying AmeriBank its right to statutory protection is clear error and that error results in material injustice.

FOR THESE REASONS, the Michigan Association of Community Bankers as *amicus curiae*, support Defendant-Appellant AmeriBank's request that the Court of Appeals decision and order of August 3, 2001 be reversed and the judgment of the Circuit Court for the County of Kent dated July 12, 1999 dismissing the action be reinstated.

Respectfully Submitted,

FINANCIAL LAW ASSOCIATES, P.C.

Dated June 17, 2002



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